SUPREME COURT, U. S.

JAN 14 1975

in the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-438

ATHENEUM BOOKSTORE, INC., a Florida corporation, its officers, employees and agents,

Petitioner,

vs.

CITY OF MIAMI BEACH, a Florida municipal corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MIAMI REVIEW — 371-4650 — 377-3721

INDEX

	Page
JURISDICTION	2
AMPLIFICATION OF STATEMENT OF THE CASE	2
REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT:	
1.	3
2.	4
3.	5
CONCLUSION	11
CERTIFICATE OF SERVICE	12

APPENDIX

	Page
Appendix R-A	App. 1
Appendix R-B	App. 3
Appendix R-C	App. 5
Appendix R-D	App. 7
Appendix R-E	App. 11

TABLE OF CITATIONS

Case	Page
A Quantity of Books v. State of Kansas, 378 U.S. 205 (1964)	9
Freedman v. Maryland, 380 U.S. 51 (1965)	6
Ginzburg v. United States, 383 U.S. 463 (1966)	8
Heller v. New York, 413 U.S. 483 (1973), 93 S.Ct. 2789, 2792	6, 7
Leigh v. State ex rel. Kirkpatrick, 298 So.2d 215 (Fla. 1st Dist. 1974)	10
Marcus v. Search Warrants of Property, 367 U.S. 717 (1961)	9
Milonas v. Schwalb, 319 N.Y.S.2d 327 (1971)	9
Paris Adult Theater I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 2633-2634 (1973)	7, 8, 9
United States v. Thirty-seven Photographs, 402 U.S. 363 (1971)	6

TABLE OF CITATIONS (cont.)

CONSTITUTIONAL AND STATUTORY PROVISIONS

	Page
United States Constitution	
First Amendment	3, 5
Fourth Amendment	3
Fifth Amendment	3
Sixth Amendment	3
Fourteenth Amendment	3, 5
28 U.S.C. Section 1257	2
Florida Statute 847.01(8) (1973)	11
Florida Appellate Rules 3.5	3
Florida Appellate Rules 3.6	3
Charter of City of Miami Beach, Florida Section 14	3, 4
Section 14A	3, 5
Code of City of Miami Beach, Florida Chapter 25, Section 25-62.4	4

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, CITY OF MIAMI BEACH, herein files its answer in opposition to the Petition of the ATHENEUM BOOKSTORE, INC. for Writ of Certiorari to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

JURISDICTION

Respondent wishes to supplement Petitioner's jurisdictional statement by bringing to the Court's attention that the matters involved in this cause below constitute an interlocutory appeal from a ruling made by the Miami Beach Municipal Court at an adversary hearing and that this appeal has stayed all further proceedings in the Miami Beach Municipal Court and, therefore, there is no final judgment or opinion of the Municipal Court. The only final judgment which has been rendered in this cause is from the State's lowest court of appellate jurisdiction.

Petitioner's jurisdictional statement in the Petition (Petition, page 2) shows on its face, that the Petitioner has improperly invoked the jurisdiction of this Court under 28 U.S.C. §1257.

AMPLIFICATION OF STATEMENT OF THE CASE

Respondent submits that the following material facts do not appear in Petitioner's Statement of the Case:

1. The adversary hearing conducted by the Miami Beach Municipal Court Judge, which was held on June 15, 1971, was preceded by an unsuccessful attack upon the authority of the Miami Beach Municipal Court to conduct such an adversary hearing, pursuant to the Municipal Court Order of May 20, 1971 (Appendix R-A). Immediately following this unsuccessful attack in both the State and Federal Courts, the Court entered its Order of June 9, 1971.

2. The Petitioner filed its Notice of Appeal of the Miami Beach Municipal Court's Order of June 15, 1971, six days after the entry of the contested order; however, Petitioner failed to perfect that appeal pursuant to Rules

3.5 and 3.6 of the Florida Appellate Rules, which require filing of Assignments of Error and Directions to the Clerk within ten (10) days after the Notice of Appeal has been filed.

3. On July 1, 1971, the Miami Beach Municipal Court enforced its Order of June 15, 1971 (Appendix R-B) and required that all materials located in the Petitioner's store be seized for the purpose of protecting the status quo, i.e., requiring the retention of evidence for the trial of the Petitioner on an appropriate trial docket.

4. The Petitioner thereafter filed its Amended Notice of Appeal on July 19, 1971 and perfected the same pursuant to the appropriate state rules. As a result of the ensuing Interlocutory Appeal in this cause, no trial docket has ever been entered in the Miami Beach Municipal Court pursuant to Section 14 of the Charter of the City of Miami Beach (Appendix R-C).

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

Point 1.

Petitioner has not proven any denial of its First, Fourth, Fifth, Sixth and Fourteenth Amendment rights. He further has failed to prove that the Municipal Court Judge acted without authority, although its Appendix cited only a portion of the enabling sections of the Charter of the City of Miami Beach which set forth the authority of the Municipal Court. Sections 14 and 14A of the Charter of the City of Miami Beach (Appendix R-C, D) clearly grant the Municipal Court the authority to perform all acts necessary in aid of its jurisdiction.

Point 2.

The Petitioner's expedited appeal from the Order of the Municipal Judge authorizing the seizure of material, which he declared to be of an obscene nature, was never perfected pursuant to the appropriate state court appellate rules. Therefore, upon the termination of the ten (10) day stay of the Judge's Order, seizure of the contested matter was both appropriate and necessary.

The books and magazines involved in this case were initially retained by the Petitioner, who made no effort to retain those specific materials which were involved at the hearing, although photographs were taken by the City for purposes of later identifying the material in question. The Petitioner's counsel stated at the close of the adversary hearing that the Petitioner intended to remain open for business and unless closed by court order, would sell any or all of the books and magazines which were the subject of the Judge's Order (Petitioner's Appendix A, p. 9). Therefore, since the Petitioner clarified its intent to defeat the status quo during the appeal and since the Petitioner's appeal was never properly perfected, the Municipal Court Judge acted in the only appropriate manner which was available, i.e., to seize the contested material and retain the same for purposes of trial of the Petitioner upon an appropriate trial docket, pursuant to Section 14 of the Charter of the City of Miami Beach (Appendix R-C) and Section 25-62.4 of Chapter 25 of the Code of the City of Miami Beach (Appendix R-E).

Point 3.

The Petitioner's First and Fourteenth Amendment rights were never violated by the Miami Beach Municipal Court. The facts clearly indicate that the Petitioner was provided an adversary hearing as soon as possible, in light of the Petitioner's fruitless attempts to obtain judicial restraint. The protection of Petitioner's rights which were provided by the Municipal Court met the requirements of the First and Fourteenth Amendments. The conclusion of the Municipal Court Judge that the Petitioner had engaged in pandering did not require any extraneous evidence, testimony, or proof of pandering when the Municipal Court Judge entered the Petitioner's premises in person and viewed the entire activity in which the Petitioner was engaging.

The argument below is in support of the above enumerated reasons why the cause should not be reviewed by this Court.

Petitioner's Brief obfuscates the procedure which the Municipal Court conducted in this cause. The Petitioner would have this Court believe that the Municipal Court's Order of seizure was based solely upon the May 20, 1971 hearing, however, such is not the case. At that hearing, the Municipal Court Judge was presented with an affidavit from Miami Beach Police Officers which indicated that there was probable cause for a search warrant to issue pursuant to Section 14A of the Charter of the City of Miami Beach (Appendix R-D). In fact, the Petitioner unsuccessfully contested the Order of the Municipal Court which required the Petitioner to prepare itself for an adversary hearing to be conducted on the premises of the

Petitioner's bookstore. The Municipal Court acted out of an overabundance of caution in order to protect the constitutional rights of the Petitioner.

The Order of the Municipal Court which the Petitioner is attacking in these proceedings was issued as a result of the adversary hearing which was, in fact, held on June 15, 1971 at the Petitioner's premises. Although the Petitioner was duly noticed of the adversary hearing, it failed to proffer any evidence or testimony to substantiate its contention that the material was not obscene. This void of evidence or testimony favorable to the Petitioner was created solely by the Petitioner. The Court never denied the Petitioner its right to present testimony or evidence. Petitioner states in its brief at page 5 that "The hearing which was held, in reality, constituted nothing more than an ex parte determination, after which the all the literature in Petitioner's store was declared as a matter of law." Such a statement is totally without basis in this case, where the Municipal Judge merely declared that there was probable cause to consider all the material exposed for sale to be obscene for purposes of seizure, for use as evidence at a subsequent trial. This procedure clearly falls within the requirements of law set forth by this Court in **Heller v. New York**, 413 U.S. 483 (1973), 93 S.Ct. 2789, where the Court relied upon its prior decisions in **United States v. Thirty seven Photographs**, 402 U.S. 363 (1971) and **Freedman v. Maryland**, 380 U.S. 51 (1965),

Petitioner has attempted to attack the Municipal Court's procedure based on authority of this Honorable Court which, in fact, authorizes that type of procedure. In **Heller, supra,** at 93 S.Ct. 2790, 2792, this Court reaffirmed the fact that it has never held or even implied

that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized pursuant to a warrant, albeit a judicial determination must occur promptly so that delay does not, in itself, become a form of censorship. In this cause, any delay between the seizure order and a final judicial determination by the Municipal Court was caused solely by the Petitioner's judicial attacks upon the adversary hearing and seizure order. Such delay cannot be considered a deprivation of Petitioner's rights. See **Heller v. New York, supra.**

The adversary hearing which was held on June 15, 1971 clearly provided Petitioner with an opportunity to be heard and to present any evidence it saw fit. The Petitioner's recollection of the events which occurred at that time clearly are not reflected by the record of the case. All of the books and magazines were identified by photographs taken at the time of the adversary hearing and although the names of the books were not read into the record, the photographs which clearly identified the material were retained by the Court as part of its record of the adversary hearing. This Court stated in **Paris Adult Theatre I v. Slaton,** 413 U.S. 49, 93 S.Ct. 2628, 2633 (1973), at the very outset of its opinion, that the Court does not undertake to tell the states what they must do, but rather to define the area in which they may chart their own course in dealing with obscene material. It is interesting to note that in **Paris, supra,** the state judge, like the Municipal Court judge here, merely viewed the material involved in the case. The only other state evidence was testimony by criminal investigators that they had paid admission to see the films.

Although the Municipal Court has been prevented by these appeals from holding a trial on the matters involved herein, the procedure followed by the Municipal Court at its adversary hearing of June 15, 1971, falls directly in line with the procedure of the Georgia court which was approved by this Honorable Court in **Paris, supra.** In this case, as in **Paris, supra,** the Petitioner's counsel attacks the decision of the Municipal Court Judge upon the lack of any evidence other than a direct viewing of the books and magazines as constituting a violation of the Petitioner's constitutionally protected rights. This Court has previously held in **Paris Adult Theater I v. Slaton, supra,** at 93 S.Ct., 2632, 2634, that it was not error "to fail to require expert affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence (citations omitted)." It is all to clear, also, that the Municipal Judge considered the allegedly obscene materials, by viewing same in the "context of the circumstances of sale, i.e., the setting in which the publications were being offered and were, in fact, presented to the public." Assuredly, the Municipal Judge could, and did, view the publications against "a background of commercial exploitation of erotica solely for the sale of their prurient appeal." A more classic example of the description Justice Brennan set forth in **Ginzburg v. United States,** 383 U.S. 463 (1966), would be rather difficult to find. Even if this case were "close," the undisputed evidence of pandering would prove the essential obscene nature of the materials in question, however, the photographic record, we contend, entirely supports the judicial finding absent a determination there was an over abundance of pandering on the part of the Petitioner, and which the record reveals undeniably.

Notwithstanding the position of this Court as set forth at the outset of its decision in **Paris, supra,** Petitioner proposes that the Miami Beach Municipal Court must follow guidelines for an adversary hearing which were formulated by a New York State Supreme Court, a court of similar jurisdiction to the Florida Circuit Court. In **Mitonas v. Schwalb,** 319 N.Y.S.2d 827 (1971), the New York Supreme Court, Special Term, attempted to provide guidelines to the Criminal Court of the City of New York, which is equivalent to the Municipal Court of the City of Miami Beach, wherein the lower court judge, after viewing the films, set the matter down for an "adversary hearing" where at the judge announced that once he had seen the films he would accept no testimony as to whether the picture in fact appealed to prurient interests or violated current community standards. No such case is presented herein.

The Petitioner has failed to cite to this Court any authority upon which a Writ of Certiorari should issue to the Circuit Court. Although the Petitioner likens this case to that of **Marcus v. Search Warrants of Property,** 367 U.S. 717 (1961), and **A Quantity of Books v. State of Kansas,** 378 U.S. 205 (1964), those cases have no applicability to the facts presented in this case. The Petitioner argues in its Brief at page 10, that this Court's holdings in **Quantity, supra,** and **Marcus, supra,** should have been applied by the Municipal Court.

In the present case, the Municipal Judge did not enter any order of seizure until he had personally viewed the entire premises involved. Rather than an ex parte judicial determination of several representative books which were reviewed in a "sterile atmosphere," the Municipal Judge

reviewed the books and magazines in light of the entire context in which the Petitioner presented the material to the public.

Petitioner also argues that the Municipal Court has no authority to rule upon the materials involved in this case pursuant to Florida Statute 847.01(8) (1973). That statute on its face granted the power of imposing the state obscenity statute solely within the jurisdiction of State Courts, thereby relieving Municipal Courts of any jurisdiction. This statute has been judicially limited, however, in **Leigh v. State ex rel. Kirkpatrick,** 298 So.2d 215 (Fla. 1st Dist. 1974) to apply solely to films. Since this case involves books and magazines, the Petitioner's argument that state law prohibits prosecution by the Respondent is inapplicable.

CONCLUSION

Respondent, CITY OF MIAMI BEACH, respectfully requests this Honorable Court to deny the Petition for Writ of Certiorari to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, and affirm the judgment of that court and the Order of the Miami Beach Municipal Court, Miami Beach, Florida, for the reasons and authorities cited hereinabove.

Respectfully submitted,

/s/ Lionel Barnet

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was mailed this ____ day of January, 1975, to Joel Hirschhorn, P.A., 1040 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130.

APPENDIX

APPENDIX "R-A"

IN THE MUNICIPAL COURT IN AND FOR
THE CITY OF MIAMI BEACH, FLORIDA

CITY OF MIAMI BEACH, FLORIDA
a municipal corporation,

Plaintiff,

vs.

ATHENEUM BOOK STORE, INC.
a Florida corporation,
its officers, employees and agents,

Defendants.

ORDER

An application has been made to the undersigned Judge by affidavit of a police officer of the City of Miami Beach, Florida, for an arrest and search and seizure warrants concerning the alleged promotion of, exhibition of, and sale of obscene books and magazines at the Atheneum Book Store, located at 1668 Collins Avenue, Miami Beach, Florida.

The affidavit, together with several magazines alleged to have been obtained from the aforesaid book store on May 14, 1971, appears sufficient for the issuance of an arrest warrant.

Because of the present uncertainty in the law concerning the seizure of a large number of publications without a prior adversary proceeding, the Court declines to issue a search and seizure warrant, but in lieu thereof,

enters this Order setting forth a date and time on which it will hold an adversary proceeding in order to determine if such warrants should be issued upon a showing that the alleged promotion of, exhibition of, and sale of books and magazines provides the requisite probable cause that a violation of law has occurred and upon which basis the search and seizure, and arrest warrants may issue. It is therefore

ORDERED that the defendants be prepared to engage in an adversary hearing on the issue of the obscenity vel non of the books and magazines herein referred to, on the premises of the Atheneum Book Store, 1668 Collins Avenue, Miami Beach, Florida, on the 24th day of May, 1971, at 10:30 o'clock A.M. for the purpose of determining whether or not an Order of seizure shall issue and a warrant for arrest be served upon that person or those persons responsible for the promotion, exhibition and sale of the aforesaid materials.

DONE and ORDERED at Miami Beach, Dade County, Florida, this 20th day of May, 1971.

/s/ Nelan Sweet

Municipal Judge

APPENDIX "R-B"

[TITLE OMITTED]

ORDER

THIS COURT having entered its Order of June 15, 1971, ordering the seizure of all materials located in the Atheneum Bookstore, 1668 Collins Avenue, Miami Beach, Florida, and further entering a Stay of Execution of the seizure for a period of ten (10) days from date of entry of that Order, and the Court having taken notice of the fact that more than ten (10) days has elapsed from the date of entry of the aforesaid Order, it is, therefore,

ORDERED AND ADJUDGED that the Order of Seizure of all the materials consisting of books and magazines which were viewed by the Court and described in those certain adversary proceedings which took place on June 15, 1971, on the premises of the Atheneum Bookstore, 1668 Collins Avenue, Miami Beach, Florida, and at which time the Court entered the Order of Seizure heretofore disclosed, be and the same is executed, and the Police Department of the City of Miami Beach, by and through its Vice Control Unit, be and is hereby directed to effectuate the seizure upon the entry of this Order or as soon thereafter as practicable, and, it is further

ORDERED AND ADJUDGED that all materials seized pursuant to the authority contained in this Order shall be secured in an appropriate place of storage under the control of the Miami Beach Police Department pending the prosecution of The Atheneum, Inc., a Florida corporation, in future proceedings in this or any other Court

having jurisdiction of this cause and the aforesaid materials shall, upon appropriate Court Order, be delivered to the Court having jurisdiction to be dealt with as provided by law.

DONE AND ORDERED this 1st day of July, 1971, at Miami Beach, Dade County, Florida.

/s/ Nelan Sweet

JUDGE, MUNICIPAL COURT

ORDER TO BE SERVED UPON:
Captain Sistrunk
Miami Beach Police Department
Vice Control Unit

COPY OF ORDER TO:
Joel Hirschhorn, Esq.
1040 City National Bank Bldg.
25 West Flagler Street
Miami, FL 33130

APPENDIX "R-C"

CHARTER OF THE CITY OF MIAMI BEACH, FLORIDA

Sec. 14. Powers and duties of municipal judge; associate judge; clerk of court.

It shall be the duty of the municipal judge to hold daily terms of court in the city courtroom or such place as may be designated by the city council for the trial of all persons charged with violation of any of the ordinances of the city, which trial shall be without jury, and upon conviction of such person or persons, to impose upon him or them, such penalty as may be provided by such ordinances; and a sworn or verified complaint shall not be necessary to give the municipal court jurisdiction of offenses triable in that court but the accused may be tried of the offense as docketed, provided such docket entry is sufficient to put the accused upon notice of the offense of which he is charged. He shall have the power to summons witnesses, issue warrants for arrest upon affidavit duly filed, to administer oaths and do all other acts necessary for the performance of his duties. He shall have also power to punish for contempt of court by a fine not exceeding fifty dollars or imprisonment not exceeding thirty days, or both. The costs of prosecution in said court shall be the same as are allowed by law in criminal courts of record being taxed against persons convicted, and collected by the city clerk, to be paid over by him to the city depository and placed to the credit of the police fund.

The city manager shall have the power to appoint by and with the consent of the city council, an associate municipal judge, who shall have all the powers and perform all the duties of the municipal judge in case of sickness, absence or disqualification of the municipal judge. The city clerk or duly authorized deputy shall act as clerk of the municipal court.

APPENDIX "R-D"

CHARTER OF THE CITY OF MIAMI BEACH, FLORIDA

Sec. 14(a). Search warrants.

The municipal judges shall have power to issue search warrants upon either of the following grounds:

1. When the property shall have been stolen or embezzled in violation of law.

2. When any property shall have been used:

(a) As a means to commit any misdemeanor, or

(b) In connection with gambling, gambling implements and appliances, or

3. When any property is being held or possessed:

(a) In violation of any of the laws prohibiting the manufacture, sale and transportation of intoxicating liquors;

(b) In violation of any of the laws or ordinances of the City of Miami Beach.

4. A search warrant cannot be issued except upon probable cause supported by affidavit or affidavits, naming or describing the person, place or thing to be searched and particularly describing the property or thing to be seized; no such warrant shall be issued in blank and any

such warrant shall be returned within ten days after issuance thereof.

5. The municipal judges, before issuing the warrants, must have the application of some person for said warrant duly sworn to and subscribed, and may receive further testimony from witnesses or supporting affidavits, or depositions in writing, to support the application. The affidavit and further proof, if same be had or required, must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

6. The municipal judges, upon examination of the application and proofs submitted, if satisfied that probable cause exists for the issuing of the search warrant, shall thereupon issue a search warrant signed by him with his name and office, to any sheriff and his deputies or police officer or other person authorized by law to execute process, commanding the officer or person forthwith to search the property described in the warrant or the person named, for the property specified, and to bring the same before him.

7. The search warrant shall, in all cases, be served by any of the officers mentioned in his direction, but by no other person except in aid of the officer requiring it, said officer being present and acting in its execution.

8. The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of his authority and purpose, he is refused admittance to said house or access to anything therein.

9. A search warrant issued under the provisions of this section may, if expressly authorized in such warrant by the judge issuing the same, be executed by being served either in the daytime or in the nighttime, as the exigencies of the occasion may demand or require.

10. All search warrants shall be issued in duplicate. The duplicate shall be delivered to the officer with the original warrant, and when the officer serves the warrant, he shall deliver a copy to the person named in the warrant, or in his absence to some person in charge of, or living on the premises.

When property is taken under the warrant the officer shall deliver to such person a written inventory of the property taken and receipt for same, specifying the same in detail, and if no person is found in possession of the premises where such property is found, shall leave the said receipt on the premises.

11. Upon the return of the warrant the officer shall attach thereto or thereon a true inventory of the property taken under the warrant, and at the foot of the inventory shall verify the same by affidavit taken before some officer authorized to administer oaths, or before the issuing officer, said verification to be to the following effect:

I, ..., the officer by whom the warrant was executed do swear that the above inventory contains a true and detailed account of all the property taken by me on said warrant.

12. The judge to whom the warrant is returned, upon the request of any claimant or any person from

whom said property is taken, or the officer who executed the search warrant, shall deliver to said applicant a true copy of the inventory of the property mentioned in the return on said warrant.

13. If it appears to the judge before whom the warrant is returned that the property or papers taken are not the same as described in the warrant, or that there is no probable cause for believing the existence of the grounds upon which the warrant was issued, the judge may order a return of the property taken.

14. Whoever shall knowingly and wilfully obstruct, resist or oppose any officer or person aiding such officer, in serving or attempting to serve or execute any search warrant, or shall assault, beat or wound any person or officer, or his deputies or assistants, knowing him to be such an officer, or person so authorized, shall be fined not more than five hundred dollars, or imprisoned for not more than sixty days.

15. Any person who maliciously and without probable cause procures a search warrant to be issued and executed shall be fined not more than five hundred dollars or imprisoned for not more than sixty days.

APPENDIX "R-E"

CODE OF THE CITY OF MIAMI BEACH, FLORIDA

Sec. 25-64.2. Obscenity.

(1) Declaration of policy. The city council deems it contrary to the public health, safety, welfare and morals to permit or allow the promotion of obscene material in the city.

(2) Definitions. As used in this section, the following words and terms shall have the following meanings:

(a) "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

(b) "Obscene." Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

(c) "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

(d) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or to agree to do the same.

(3) Violations. It shall be unlawful and a person is guilty of obscenity when, knowing its content and character, he:

(a) Promotes, possesses with intention to promote any obscene material: or

(b) Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

(4) Presumptions.

(a) A person who promotes obscene material, or possesses the same with intent to promote it in the course of his business is presumed to do so with knowledge of its content and character.

(b) A person possessing five or more identical or similar obscene articles is presumed to possess them with intent to promote the same.

(5) Defense. In any prosecution for obscenity, it is an affirmative defense that the persons to whom allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing or viewing the same.

(6) Evidence; adjudication of obscenity. In any prosecution for obscenity, evidence shall be admissible to show:

(a) The character of the audience for which the material or performance was designed or to which it was directed;

(b) What the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on conduct of such people;

(c) Artistic, literary, scientific, educational or other merit of the material;

(d) The degree of public acceptance of the material;

(e) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; and

(f) The good repute of the author, creator, publisher or other person from whom the material originated.

Expert testimony and testimony of the author, creator, publisher or other person from whom the material originated, relating to factors entering into the determination of the issue of obscenity, shall be admissible. The court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene.

(7) Confiscation of prohibited material. Whenever anyone is convicted of violating this section, the court, in awarding sentence, shall make an order confiscating the obscene material and authorize and direct the chief of police to destroy the same.

(8) Minors under seventeen years of age. The provisions of this section shall be inapplicable and unenforceable to persons under seventeen years of age in order to comply with the 1969 Florida Statutes which have preempted this area by special legislation regarding such persons.